83-238

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

BENJAMIN LOPERA-OCHOA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Has a criminal defendant been denied his constitutional right to due process of law when he is sentenced to an extremely harsh sentence as a direct result of erroneous information acquired from anonymous sources which is contained in a sentencing memorandum filed with the court by the prosecutor?

PARTIES TO THE PROCEEDING

The only parties to this proceeding are the Petitioner, Benjamin Lopera-Ochoa, and the Respondent, United States of America.

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SUPREME COURT OF THE UNITED STATES

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No.

BENJAMIN LOPERA-OCHOA, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioner, Benjamin Lopera-Ochoa, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on April 21, 1983. A petition for rehearing was denied by the Court of Appeals on June 23, 1983.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is attached as Appendix "A" hereto. The order denying the petition for rehearing is attached as Appendix "B".

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 21, 1983. The order denying a rehearing was entered on June 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and (2).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall...be deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

The Petitioner, Benjamin Lopera-Ochoa,

pleaded guilty to a two count indictment charging him with conspiracy to distribute cocaine in violation of 21 U.S.C. §846 and with the distribution of approximately two kilograms of cocaine in violation of 21 U.S.C. §841(a)(1).

The Petitioner received a sentence of 12 years imprisonment on each count to run consecutive to one another, for a total term of imprisonment of 24 years. Petitioner also received fines totalling $50,000 and a 15 year special parole term.

Petitioner appealed to the United States Court of Appeals claiming that the trial judge received incorrect and false information concerning the Petitioner from the Government's attorney at the time of sentencing. The false information was contained in a sentencing memorandum filed with the District Court by the

Assistant United States Attorney who prosecuted the case. It was clear at the time of sentencing that the District Court relied upon the false information in the Government's sentencing memorandum when it imposed its extremely harsh sentence of 24 years.

The critical part of the sentencing memorandum was entitled "The Lopera Narcotics Organization." The memorandum asserted that Petitioner, along with his brothers, controlled a substantial quantity of the cocaine traffic in the Southern California area. According to the memorandum:

> One local expert on the family, Sargeant Ron DePompa of the Glendale Police Department, has followed the Lopera family's criminal activities for a number of years. DePompa asserts that Benjamin Lopera is a multi-kilogram dealer of cocaine, who arranges for the importation of the drug by various couriers. The couriers swallow cocaine packed in the severed

> fingers of plastic surgical gloves, then fly from Colombia to Los Angeles. Upon arrival in the United States, the couriers then excrete the contents. In recent weeks at a time consistent with Lopera's presence in Los Angeles, 32 such couriers were arrested at Los Angeles International Airport, arriving from Bogota, Colombia. DePompa states that this information is based on reliable, Spinelli-qualified informants. These informants also stated that Lopera's organization causes to be brought into the United States 5 to 15 kilograms of cocaine each week with a wholesale value of $250,000 to $750,000. (ECR 13)

The memorandum details a search of an apartment on July 22, 1982 where certain documents were found indicating that Lopera had four different drug customers. The memorandum then goes on to speculate as to the potential volume of the Petitioner's business based on the ledger:

> Assuming he had only the four customers identified on the sales ledgers, and delivered to them no less than 1/2 kilogram per sale, Lopera would be selling no less than 6 kilograms per week or nearly 50 kilograms in his 2 months in the United States. At wholesale prices of $56,000 per kilogram, Lopera's business during this period would range to nearly $3 million, a figure consistent with the aforesaid informant's statement. If he were selling to other customers, or for larger amounts than the minimum computed herein, or for a longer time than detected by the Government's recent investigation, the monies earned would increase substantially. (ECR 14)

The Government then asserted in the memorandum that based on "informants", the Petitioner controlled a ranch in Colombia used as a base for growing cocaine as a crop and additionally, had access to a chemical laboratory in which to process the cocaine. (ECR 14)

The Government also asserted that the Petitioner's ownership interest in two

businesses, the "El Dorado Club" and Rhino's Garage" were nothing more than fronts for conspiratorial meetings. (ECR 15-16)

The Government additionally contended that through "investigators", it was uncovered that the Petitioner was a source of supply for Eddie Nash. It was pointed out in the memorandum that Nash was under investigation and linked to murders of four Los Angeles residents in 1981. According to the Government, "Lopera himself was subpenaed to testify in the narcotics-homicide case of one Oswaldo Pinedo, a reputed drug dealer associated with the Loperas." (ECR 16-17)

The Petitioner not only specifically and vehemently denied the allegations made by the Government, but requested proof to support the claims made and even suggested steps that could be taken to prove or

disprove the allegations made by the Government in its memorandum. (ECR 22-23)

At the time of sentencing, counsel for the Government described Petitioner's criminal activity as "one of the largest cocaine smuggling businesses in all of Southern California." (RT 17) The Government then described the activities of the Petitioner's brothers, including the fact that the Government was unable to prosecute the Petitioner's brother as a result of several witnesses who turned up missing. The Government noted:

> I am not asking the Court to hold that against this brother, however, the Defendant before the Court. I think it only shows you a little bit how dangerous a human being we have before the Court and how serious the matter is, that the Court needs to incarcerate this man the maximum term at law. (RT 18)

The Government then argued to the Court that the Petitioner may be a member

of the "La Costa Nostra", was creating a new organized crime family, and was responsible for the 32 arrests made in the Central District of Los Angeles of defendants secreting cocaine in their intestinal tract during the spring of 1982. (RT 22-23)

In sentencing the Petitioner, the District Court stated:

> The Court has considered all the relevant matters, and I feel that this man is a big dealer, a big cocaine dealer. There is too much of a coincidence to find the number of cases we have of people from Colombia meeting at the corner of Bogota and Caracas Streets, or something like that, and getting drunk and being under drugs, and then swallowing 120 globules, or balloons, as I call a cock-and-balloon story, if I ever heard one. Somebody is organizing this. From all I've seen, I have a strong feeling that this defendant organized it. (RT 25)

The following day, Tuesday, September 21, 1982, the same District

Court judge that sentenced Petitioner found Neftali Y. Gordon guilty after a stipulated facts trial of smuggling cocaine into the United States by tying it off in balloons and ingesting it. In urging the defendant to cooperate with the DEA prior to sentencing, the Court indicated:

> On the other hand, there has been a serious crime and we cannot permit it to continue. This is one of the best ways to attack it, it seems to me, to strike at the top dogs so far we can find them. I say that because if you get any top dog in here, just like yesterday when we had Lopera-Ochoa, or whatever his name was, I don't treat them lightly. I give it to them, which they deserve, because they are the leaders, and the rest of the people are dupes and donkeys to go around doing these things for money, nevertheless, I think we can strike a hard blow, if you will, at the top dog. (ER 45)

REASON FOR GRANTING THE PETITION

I

A CRIMINAL DEFENDANT'S RIGHT TO DUE PROCESS OF LAW IS VIOLATED WHEN HE IS SENTENCED TO A HARSH SENTENCE, AS A RESULT OF ERRONEOUS INFORMATION ACQUIRED FROM ANONYMOUS SOURCES, WHICH IS CONTAINED IN A SENTENCING MEMORANDUM FILED BY THE PROSECUTOR

The Petitioner's case presents a substantial issue which confronts a large number of defendants convicted of criminal offenses in the courts of the United States. When the Petitioner appeared for sentencing after pleading guilty to two federal narcotic violations, he was faced with a sentencing memorandum filed by the prosecutor which contained false and highly prejudicial information.

The Government's sentencing memorandum, relying upon anonymous sources in the underworld, labeled the Petitioner a major crime figure in Los Angeles. The memorandum accused the Petitioner of being responsible

for sending 32 drug couriers who were arrested at Los Angeles International Airport after arriving from Colombia. It also claimed that during the few months prior to his arrest, the Petitioner amassed a three million dollar fortune from the sale of Colombia imported cocaine.

None of this information was ever proven or substantiated by the Government. The source of this information remained anonymous. The alleged wealth amassed by the Petitioner was patently speculative on the Government's part. And finally, the Petitioner vehemently denied the truth of all of the allegations set forth in the Government's sentencing memorandum.

The District Court chose to believe this false information and sentenced the Petitioner to an extremely harsh 24 year

sentence. The only other defendant sentenced in the case received a six year sentence. The disparity in the two sentences is a direct result of the outrageously false and ludicrous information contained in the Government's sentencing memorandum.

Title 18, U.S.C. §3577 provides that:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

The broad language of Section 3577, which is part of the Organized Crime Act of 1970, cannot be accepted at face value. This Court has previously stated that the requirements of the Due Process Clause must apply at the sentencing hearing. In Gardner v. Florida, 430 U.S. 349, 358

(1977), this Court stated:

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel... The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

The line of cases leading to Gardner v. Florida, supra, starts with Williams v. New York, 337 U.S. 241 (1949). In Williams, this Court rejected the notion that the Due Process Clause requires that the rules of evidence apply at a sentencing hearing. "[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not

be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable at trial." (337 U.S., at 247)

One year earlier in Townsend v. Burke, 334 U.S. 736 (1948), this Court overturned a sentence imposed upon an unrepresented defendant, where the court based its sentencing decision upon the erroneous conclusion that the defendant had two prior convictions. One of the alleged prior convictions had been an acquittal and the other had been dismissed. This Court stated that:

> [w]hile disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand. (334 U.S., at 740-741)

On other occasions, this Court has ruled upon what matters may or may not be considered by a judge at the time of sentencing. For example, in United States v. Tucker, 404 U.S. 443 (1972) it was held that a judge may not consider a constitutionally invalid prior conviction. See also, United States v. Farrow, 580 F. 2d 1339 (9th Cir. 1978). A sentencing judge may consider a defendant's refusal to cooperate with investigative agencies, Roberts v. United States, 445 U.S. 552 (1979), and may consider the fact that the defendant testified falsely at his trial. United States v. Grayson, 438 U.S. 41 (1978).

In death penalty cases, the sentencing authority must consider factors concerning both the circumstances of the offense and the character and background of the offender. Roberts v. Louisiana, 428 U.S.

325 (1978). Statutes which limit considerations of mitigating circumstances violate the capital defendant's right to due process of law. Eddings v. Oklahoma, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

There has been no case, however, decided by this Court concerning the consideration by a sentencing judge of false information, acquired from anonymous sources, which is set forth in a government prosecutor's sentencing memorandum. The lower federal courts and some state courts have held that it is a violation of a defendant's rights for the sentencing judge to consider false information in sentencing a convicted defendant. United States v. Weston, 448 F. 2d 626 (9th Cir. 1971); United States v. Bass, 535 F. 2d 110 (D.C. Cir. 1976); United States v. Needles, 472 F. 2d 652 (2d Cir. 1972);

United States v. Fatico, 441 F.Supp.1285 (1977); State v. Pohlabel, 160 A.2d 647 (N.J. 1960); State v. Killian, 370 P. 2d 287 (Ariz. 1962). But see, United States v. Fatico, 579 F. 2d 707 (2d Cir. 1978).

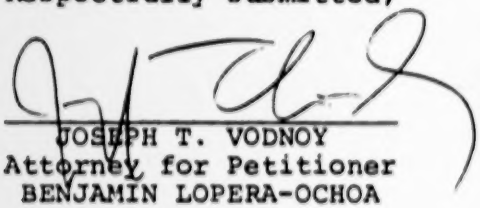
The Petitioner's case is different from Townsend v. Burke, 334 U.S. 736 (1948) because in Townsend, the defendant did not have counsel and the false information was easily corrected from an examination of court records. In the Petitioner's case, the false information comes from anonymous informers in the underworld. Such information, consisting of mere rumors and speculation, is not a substantial basis upon which a sentencing authority may impose a sentence. Until the Government's practices in this case are brought to a halt, many others who are and will be facing sentencing hearings will be denied their constitutional right

to due process of law.

CONCLUSION

Based upon the foregoing, Petitioner urges this Court to grant this petition.

Respectfully submitted,



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BENJAMIN LOPERA-OCHOA

APPENDIX "A"

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1521
DC No. CR-80-1008 AAH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

BENJAMIN LOPERA-OCHOA,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Honorable A.Andrew Hauk,District Judge Presiding
Submitted March 23, 1983*

M E M O R A N D U M

Before: ANDERSON, POOLE, AND NELSON,
Circuit Judges

[Filed Apr. 21, 1983]

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*The motion for oral argument is denied. The panel is unanimously of the view that this appeal is proper for submission on the record and the briefs. F.R.App.P. 34(a), Ninth Circuit Rule 3(a).

Contending that the district court's sentence of 24 years (2 counts, 12 years each) and a $50,000.00 fine (2 counts, $25,000.00 each), and a special parole term of 15 years was impermissibly enhanced in reliance on inaccurate and unreliable presentencing information, defendant appeals. See Farrow v. United States, 580 F. 2d 1339, 1359 (9th Cir. 1978) (en banc).

The sentences were within permissible statutory limits. United States v. Tucker, 404 U.S. 443 (1972). The court did, in part, base its sentence upon hearsay information indicating that defendant may have been a major narcotics trafficker. However, the record does not support the assertion that the information was false or unreliable. Additionally, among other facts, it is apparent from the record that defendant absconded from

custody for over two years, he entered a plea of guilty to one count of conspiracy to distribute cocaine and one count of aiding and abetting the distribution of two kilograms of cocaine, and he admits that he offered to sell undercover agents ten to forty kilograms a month. These additional factors were also relied on by the district court in imposing the sentences, and are sufficient in themselves to justify the sentence.

We are not persuaded that the district court abused its broad discretion. United States v. Weston, 448 F.2d 626 (9th Cir. 1971); cert. denied, 404 U.S. 1061 (1972); United States v. Larios, 640 F.2d 938 (9th Cir. 1981); United States v. Alverson, 666 F. 2d 341 (9th Cir. 1982).

AFFIRMED.

APPENDIX "B"

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1521
DC No. CR-80-1008-AAH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

BENJAMIN LOPERA-OCHOA,

O R D E R

Before: ANDERSON, POOLE, and NELSON,
Circuit Judges.

[Filed June 23, 1983]

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing

en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.